

2011 WL 1054450 (S.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. California.

Margaret CRUICKSHANK, an individual, Plaintiffs,

v.

WELLS FARGO BANK, N.A.; Wells Fargo Bank Southwest N.A.; Wachovia
Mortgage F.S.B.; World Savings Bank, F.S.B.; Golden West Savings Association
Service Co.; Executive Trustee Services; and Does 1 to 10, Inclusive, Defendants.

No. 3:10-cv-01545-W-NLS.
January 24, 2011.

Plaintiff's Reply to Wachovia's Opposition of Motion for Preliminary Injunction

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Honorable Judge [Thomas J. Whelan](#).

Honorable Judge Thomas J. Whelan Courtroom 7

Date: January 31, 2011

Time: 10:30 a.m.

Courtroom: 7

I. DEFENDANT WACHOVIA DOES NOT MEET ITS BURDEN IN OPPOSITION TO PLAINTIFF'S REQUEST FOR AN INJUNCTION

Defendants Wachovia Mortgage, a division of Wells Fargo Bank, N.A., formerly known as, Wachovia Mortgage, FSB, formerly known as, World Savings Bank, FSB, (collectively hereafter, "WACHOVIA") have failed to meet their burden of proof to raise a viable opposition to the Plaintiffs Motion for Injunction. Defendants have failed to offer any evidence rebutting the plaintiff's evidence submitted with her motion or showing that the facts alleged therein cannot be proven at trial. In many sections of their Opposition Defendants simply challenge the factual allegations in the Plaintiffs First Amended Complaint as inadequate to state a cause of action, failing to review and consider the facts as alleged in the affidavits submitted with Plaintiffs motion. Once the moving party has carried its burden of showing a likelihood of success on the merits, the burden shifts to the nonmoving party to show a likelihood that its affirmative defense will succeed. (*Gonzales v. O Centra Espirita Deneficente Uniao do Vegetal* (2006) 546 US 418, 429, 126 S.Ct. 1211, 1219; *Perfect 10, Inc. v. Amazon.com. Inc.* (9th Cir. 2007) 508 F3d 1146, 1158.) Defendants have provided no evidence in support of their defense to the Plaintiffs case. As set forth below, defendants' legal challenges to the sufficiency of each cause of action are unsupported by the law and defendants do not attempt to meet their burden of proving a successful affirmative defense to the plaintiff's claims.

A. PLAINTIFF HAS CARRIED HER BURDEN OF SHOWING A LIKELIHOOD OF SUCCESS ON HER CLAIMS FOR FINANCIAL ELDER ABUSE, FRAUD AND NEGLIGENCE

Two erroneous factual contentions made by Defendants in their Opposition must be addressed. The first is that the Plaintiff knowingly submitted a false loan application, the second is that plaintiff could have easily read the contract and understood the loan terms at closing.

Plaintiff states in her Declaration that the loan application was filled out over the phone by defendants, that defendants concealed from her what they wrote in her actual application and she was not given a chance to review it at closing. (Declaration of Margaret Cruickshank, par.'s 6 and 7.) Plaintiff further describes above that she could not have easily read the contract and understood the loan terms at closing. (Declaration of Margaret Cruickshank, par.'s 7, 8.) These facts are also well pled in the First Amended Complaint. (FAC par. 19, 21, 23.) In addition, it is very clearly stated in the Plaintiff's Declaration that she is legally deaf, and that defendants took advantage of this condition to conceal the loans terms and place her into a toxic loan with the monetary benefits for themselves. "I am currently 85 years old, I have been diagnosed as legally deaf and physically disabled." (Declaration of Margaret Cruickshank, par. 1.) Further, the Declaration of Heather Yellen submitted with the Plaintiff's motion states that the interest rate terms of Mrs. Cruickshank's loan sold to her by Wachovia were not disclosed in the paperwork or "contract" she received at closing. The contract she received at closing did not disclose the actual interest which would be accruing based on a much higher fully indexed rate: "The fully indexed rate is calculated by adding the borrower's margin to the current Cost of Savings Index (COST)." (Declaration of Heather Yellen, par. 3.) The documents provided by Wachovia did not disclose the amount of this fully indexed rate, this could only be determined by an independent search of the current Cost of Savings Index (COS!) at the time of that particular payment (Declaration of Heather Yellen, par. 4.) The actual amount of the index tied to the COSI is not disclosed on the Promissory Note, COSI disclosure, or other loan documents Mrs. Cruickshank signed or reviewed." (Declaration of Heather Yellen, par. 5.)

Compounding the above-described conduct of Wachovia to intentionally prevent the Plaintiff from discovering the actual toxic terms of the loan, were Doe 1 and Phillip Franklin's fraudulent misrepresentations to her which led her to believe (because she reasonably relied upon his **financial** advice) that: a) she did not qualify for a reverse mortgage which would have been far more beneficial to her and less lucrative to Defendants, b) that the loan did not contain such toxic terms and c) that her application was accurate and that she really did qualify for such a loan on her limited income. These misrepresentations and her reliance are described in Mrs. Cruickshank's Declaration. (Declaration of Margaret Cruickshank, par. 5, 7.)

Contrary to the Defendants' unsupported assertions in their brief, the evidence provided by Mrs. Cruickshank meets her prima facie burden of proof, and shows conclusively. (Defendants have chosen NOT to dispute said evidence) that she did not knowingly submit a "false" loan application, that defendants concealed what they had written on the application from her, and that she was prevented by defendants and by her own physical state from understanding the loan terms at closing.

As set forth above, the plaintiff has offered evidence, through the Declarations of Margaret Cruickshank, her son Ian Cruickshank and Heather Yeien, of Defendants' predatory lending practices targeted at the **elderly** and at her, which constituted **Financial Elder Abuse** as set forth in [California Welfare & Institutions Code §15610.30](#). As stated in Plaintiff's moving papers, this conduct has been recognized as **financial elder abuse** by the California Attorney General's Office. (See also, *Giordano v. Wachovia Mortgage* 2010 U.S. Dist. LEXIS 136284 (N.D. December 14, 2010).) Defendants argue there are no allegations showing the required element that defendants took, secreted, appropriated, or retained any property to a wrongful use or with intent to defraud. To the contrary, this action is based upon the fact that the defendants intentionally targeted the plaintiff to trap her into a toxic loan for which they would profit handsomely. This is argued extensively in Plaintiff's moving papers. (Plaintiff's Memorandum of Points and Authorities in Support of Injunction page 2 and 3.)

Plaintiff has alleged and states in her Declaration and her moving papers that Defendants' predatory and **abusive** conduct was committed by two lending officers and agents of Wachovia (Phillip Franklin and Doe 1) as well as other Does. Plaintiff alleges in her First Amended Complaint that Defendant Wachovia authorized and ratified the conduct of its agents, (FAC par. 9), and that Defendant "trained, directed, and authorized their employees and agents to implement this scheme by affording them monetary incentives to gain the trust of borrowers to induce them into predatory loans and to conceal the true facts from the borrower, Plaintiff included." (FAC par.12.)

With regards to the statute of limitations argument raised by Defendant, Plaintiff has alleged and states in her Declaration facts and evidence supporting the tolling of the statute of limitations for **Financial Elder Abuse**, Fraud and Negligence. As set forth above Plaintiff has offered evidence of Wachovia's conduct to intentionally prevent Plaintiff from discovering the actual toxic terms of the loan, and to compound this, their fraudulent misrepresentations to her concerning the loan. The evidence offered shows that Mrs. Cruickshank had "lack of knowledge" and was prevented from obtaining that knowledge by Wachovia, satisfying that prong of the test to toll the statute of limitations until discovery of the fraud. (See *Parson v. Tickner* 31 Cal.App.4th 1513, 1525, (1995).

With regards to the Plaintiff's discovery of the fraudulent conduct committed by Wachovia, Ian Cruickshank states in his Declaration that while his mother was in the hospital he reviewed his mother's **financial** records and her mail she received in October 2008 and discovered the toxic terms of the refinance loan that had sent her into this medical emergency. He states that he had to wait until the Plaintiff's condition stabilized to explain the impact of these terms to her and why her balance had been increasing. It was in early 2009 that he discussed the loan terms with the Plaintiff and explained them to her. (See Dec. Margaret Cruickshank, par. 12, Declaration of Ian Cruickshank, par. 3, 4.) Mrs. Cruickshank also states that she had been receiving billing coupons from WACHOVIA which showed the minimum monthly amount she could pay, with no explanation that it was insufficient to cover the interest accruing. (Dec. Margaret Cruickshank, par. 12.) These un rebutted facts are sufficient to satisfy the discovery rule tolling the statute of limitations. (*Id.*)

Defendants argue there are no allegations showing the required elements to state a cause of action for Fraud and for Negligence. To the contrary, Plaintiff has offered substantial evidence of Fraud and Negligence through the attached affidavits and the elements of these claims are argued extensively in Plaintiff's moving papers. (Plaintiff's Memorandum of Points and Authorities in Support of Injunction pages 12 and 13.) Mrs. Cruickshank has met her burden of proof to show that she is likely to succeed on the merits on all of these claims.

B. HOLA DOES NOT PREEMPT PLAINTIFF'S CLAIM AGAINST DEFENDANTS; AN INJUNCTION SHOULD BE GRANTED

Contrary to defendants' contention that all claims by Plaintiff are preempted under the Home Owners' Loan Act ("HOLA"), there are numerous cases which have rejected HOLA preemptions. In *Washington Mutual v. Superior Court*, 95 Cal. App. 4th 606, 619 (2002), the court put to rest any assertion that HOLA wiped clean all state laws affecting federal banks, holding that 12 C.F.R. §560.2, of course, does not preempt the application of all state and local laws pertaining to federal savings and loans. The plaintiff's unfair competition claim in *Smith v. Wells Fargo Bank, N.A.*, 135 Cal.App.4th 1463 (2006), was based on alleged nondisclosure of overdraft protection terms. The *Smith* court held that this claim was not preempted by federal regulations because such claims were based on nondisclosure, a form of misrepresentation, not a claim based on the lending function. Similar to the facts in *Smith*, Plaintiff's case is grounded in misrepresentations and nondisclosures of the terms of her loan.

Defendants Wachovia base their preemption argument on the holding in *Silvas v. E*Trade Mortg. Corp.* 514 F.2d. 1001 (9th Cir. 2008). *Silvas*, the only Ninth Circuit decision cited by Defendants, is narrowly limited to unfair advertising, involving false information on media advertising to the public regarding the borrower's right to rescission. (514 F.2d at 1003.) The court narrowly held that a cause of action for violation of California's Unfair Competition Law ("UCL") based upon violations of TILA (the Truth in Lending Act) pertaining to loan fees is preempted by HOLA. (514 F.2d at 1011.)

The HOLA preemption is intentionally qualified by the exclusion in §560.2 paragraph (c), stating that certain specified state laws are not preempted to the extent they "**only incidentally affect the lending operations of Federal savings associations or are not otherwise inconsistent with the purposes of the regulation.**" (§560.2(c).)

For instance in *McKell v. Wash. Mut., Inc.*, 142 Cal.App.4th 1457, 1482 (2006), the court noted that the duties imposed by the UCL are not "lending regulations" and do not seek to govern the manner in which savings associations operate. (*Id.* at 1487.)

Instead, applying the UCL to the Bank “simply insists that the Bank cannot misrepresent how it operates, or employ fraudulent methods in its operations.” (*Id.*) As such, it is a general proscription against unfair business practices, **not a specific regulation of a savings association**, and is not preempted by HOLA. See *id.*; see also [Gibson, 103 Cal.App.4th at 1303 \(2002\)](#). In fact, in [Lopez v. World Sav. & Loan Assn., 105 Cal. App. 4th 729, 741-742 \(2003\)](#) a case cited by Defendants, the court recognized that [California Business & Professions Code Section 17200](#) remains available to remedy a myriad of potential unfair, unlawful, and fraudulent practices engaged in by federally chartered savings and loan associations, so long as the practice is outside the scope of federal regulation.

Here, the majority of Plaintiff's state law claims, do not seek to impose “lending regulations”. Instead, the state law underlying Plaintiff's claims only incidentally affects the Defendant's lending operations.

Specifically, with regards to an action brought under the California **Elder Abuse** Act, [Cal. Welf. & Inst.Code §§ 15600-15675](#), Federal Courts have found that the purpose of this Act and the remedies granted therein are not preempted by HOLA. The purpose of the **Elder Abuse** Act is “to protect **elders** by providing enhanced remedies which encourage private, civil enforcement of laws against **elder abuse** and neglect.” [Negrete v. Fid. & Guar. Life Ins. Co., 444 F.Supp.2d 998, 1001 \(C.D.Cal.2006\)](#). The intent of HOLA does not include these protections to the **elderly** set forth in [Welf. & Inst.Code §§ 15600-15675](#). In a recent decision, [Giordano v. Wachovia Mortgage 2010 U.S. Dist. LEXIS 136284 \(N.D. December 14, 2010\)](#), the court considered a Motion to Dismiss in a case brought by an **elderly** couple against their lender, Wachovia, raising claims arising from the refinance of their home mortgage. The Giordanos alleged causes of action including promissory fraud, **financial elder abuse** and unlawful business practices in violation of [California Business & Professions Code section 17200 et seq.](#) based on the allegations that they were sold a toxic loan by Wachovia and did not understand that the initial interest rate would change after two months and believed that the rate would be in effect for the entire term of the loan, and did not understand the other toxic terms such as the negative amortization of the loan or the pre-payment penalty. The court held that the three causes of action for fraud, **financial elder abuse** and unlawful business practices survived preemption and granted leave to amend. ([Giordano v. Wachovia Mortgage 2010 U.S. Dist. LEXIS 136284](#), at pp. 16-17.) With respect to the **financial elder abuse** claim, the court found that:

“The Court agrees that state laws that impose mortgage disclosure requirements are preempted; however, it is not clear that the alleged misconduct was limited to nondisclosure. To the extent that the Giordanos are pleading fraudulent predatory practices, they may be able to make out an **elder abuse** claim that is not preempted. Claim 4 will be dismissed with leave to amend so that the Giordanos may develop it further.”

([Giordano v. Wachovia Mortgage 2010 U.S. Dist. LEXIS 136284](#), at pp. 16-17.)

In the case at hand Mrs. Cruickshank is pleading Wachovia took advantage of her age and disabilities to engage in fraudulent predatory practices. The Plaintiff has pleaded that in 2006, Defendants had a practice of intentionally targeting **elderly** people to sell them toxic loans that would create a substantial profit for defendants and which the borrowers would never be able to repay. (First Amended Complaint (“FAC”) par. 11, 35.) Defendant took advantage of the Plaintiff's age and of her deafness, and actively solicited her to sell her a toxic loan. (FAC par 14; Declaration of Margaret Cruickshank. par. 3.)

When she inquired about a reverse mortgage which would have been relatively safe in her circumstances, defendants convinced her she was not qualified for one, and coerced her into two toxic loans which she did not understand and sent her into a spiral of default and foreclosure, resulting in her admission into the hospital. (FAC par.'s 16, 23, 25, 26, 34; Declaration of Margaret Cruickshank, par. 5, 6, 10, 11.) When she discovered the actual terms of the toxic loans she had been sold and requested a loan modification, defendants denied her one. (Declaration of Ian Cruickshank, par. 5.)

In response to Defendant's preemption argument that all of Plaintiff's claims are preempted. Plaintiff contends that these facts set forth above, showing that Defendants had a practice of intentionally targeting **elderly** people to sell them toxic loans that would create a substantial profit for Defendants and took advantage of Mrs. Cruickshank in this manner, are the basis for the

Plaintiffs causes of action for Breach of Fiduciary Duty. Fraud, **Financial Elder Abuse**, Violation Of **Business And Professions Code §17200 et seq.**, Products Liability-Negligence and Strict Products Liability, Intentional Infliction Of Emotional Distress, Restitution, Injunctive Relief and Declaratory Relief. For example, but not limited to, Plaintiffs Sixth Cause of Action alleging Defendants have engaged in unlawful, unfair, and fraudulent business practices in violation of **Section 17200 of California Business and Professions Code** by engaging in predatory loan practices is fully supported by the facts and evidence set forth above and is not preempted by HOLA.

Another exception to the Silvas court decision is the holding in *Fenning v. Glenfed, Inc.* 40 Cal.App.4th 1285, 1299 (2nd Dist.) (1995), "...[a]ctions for fraud are governed almost exclusively by state law, and do not raise issues of great federal interest. Congress did not intend to preempt common law tort claims, effectively granting savings associations immunity from such state law claims."

As seen in the holdings in numerous cases, preemption depends on the nature of the claim. Thus, when the conduct alleged to violate the UCL pertains to a violation of lending regulations, the claim will generally be preempted. However, when the conduct pertains to some other conduct, as for example, intentional misrepresentations, the claim generally will not be preempted, as is the case here. Plaintiff's claims against Defendants, focus on defendant's fraudulent and oppressive methods in its operations. Such conduct is not subject to a specific regulation as set forth under **§560.2**, and therefore these causes of action are not preempted by HOLA, and as such, provide sufficient grounds to order a preliminary injunction enjoining the foreclosure sale pending trial.

II. CONCLUSION

Mrs. Cruickshank has met her burden of proof to show that she is likely to succeed on the merits, it is undisputed that she likely to suffer irreparable harm in the absence of preliminary relief, therefore that the balance of equities tips in her favor, and an injunction is in the public interest, (*Winter v. Natural Resources Defense Council Inc.*, 129 S.Ct. 365, 374 (2008)). A preliminary injunction should be granted to enjoin the sale of the subject property until after a full trial on the merits of her legitimate claims to preserve the status quo as it is until after trial and judgment. For the reasons herein. Plaintiff requests that Detendants be restrained and enjoined from conducting a trustee's sale of, transferring any ownership interest in or further encumbering the property located at 14740 Plaza Animado #161, San Diego, California 92128.

THORNTON ~ KOLLER

Dated: January 24, 2011

s/ Audrey Powers Thornton

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